(2)
No. 09-910

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IN THE
Supreme Court of the United States

ELIAS H. ATTEA, JR.,

Petitioner,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENT DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK

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COUNTERSTATEMENT OF QUESTION PRESENTED

In *Department of Taxation and Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 75-76 (1994), this Court held that federally-licensed Indian traders are properly subject to state regulation, including transactional recordkeeping requirements, that is reasonably necessary to the assessment or collection of lawful state taxes. The question presented in this case is whether New York State may require a federally-licensed Indian trader who files nonresident income tax returns in New York to maintain and produce adequate business records demonstrating the correctness of his returns and substantiating where and to whom his sales in the State were made.

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STATEMENT OF THE CASE

Petitioner, a resident of Tennessee and a federally-licensed Indian trader, brought this state court proceeding to challenge a decision of the New York State Tax Appeals Tribunal that sustained an assessment of additional personal income tax against petitioner for 1992 and 1993 (App. 34-59). The assessment arose from petitioner's wholesale tobacco sales in New York State through a business called JR Attea Wholesale (App. 27-28). Petitioner filed New York nonresident income tax returns for those years in which he allocated some of his income to New York (App. 27-28). According to petitioner, the New York income of JR Attea Wholesale was attributable solely to sales of tobacco products to Indians on reservations, and thus was not taxable by New York (App. 28).

Upon audit by the New York State Department of Taxation and Finance, the auditor determined that petitioner had an employee and agent in New York, rented warehouse space in New York and stored inventory in New York (App. 29). However, petitioner declined to produce any "books of original entry for his business, such as sales journals, general ledgers, balance sheets, expense receipts, income statements or bank statements" (App. 31-32). As a result, the Department was "unable to substantiate that the sales made by petitioner actually took place on reservations and were made to qualified tribal members as required by petitioner's Indian trader licenses or to formulate any allocation of what percentage of petitioner's sales might be tax exempt" (App. 32). Accordingly, the Department allocated all of JR Attea Wholesale's income to New York

and issued a notice of deficiency assessing additional income tax liability (App. 29-30). After an administrative hearing, an Administrative Law Judge sustained the assessment (App. 60-93).

The New York State Tax Appeals Tribunal affirmed the Administrative Law Judge's determination (App. 34-59). The Tribunal acknowledged that in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), the Court held that federal law preempted a tax on a licensed Indian trader on receipts from transactions with tribal members on a reservation (App. 53-54). The Tribunal held, however, that New York could require petitioner to maintain and produce adequate books and records establishing that his sales actually were consummated with tribal members on reservations (App. 56-57). It explained that in *Department of Taxation and Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994), this Court held that Indian traders are not immune from state regulation that is "reasonably necessary to the assessment or collection of lawful state taxes." *Id.* at 75. The Tribunal held that, as applied to petitioner, New York recordkeeping requirements were necessary to "distinguish[] petitioner's income from sales of cigarettes that is exempt from the personal income tax under the rule of *Warren Trading Post – viz.* sales to reservation Indians on the reservation – from petitioner's income from other sales which is subject to tax" (App. 57). Thus, if petitioner wished to establish that any tax was preempted, he was required to maintain and produce adequate business records for audit (App. 57).

On judicial review, the New York Appellate Division, Third Judicial Department, confirmed the Tax Appeals Tribunal's determination (App. 27-33), The court rejected petitioner's argument that "all state transactional record-keeping requirements are inapplicable to Indian traders due to preemption by federal law in this area" (App. 31). The court explained that "it is now well established that 'Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes'" (App. 31) (quoting *Milhelm Attea*, 512 U.S. at 75). The court held that "having filed a New York nonresident tax return in which he allocated a portion of his federal adjusted gross income to New York, petitioner was required to produce books and records sufficient to establish the correctness of the amount allocated" (App. 31). The court further held that petitioner had failed to establish that New York had taxed extraterritorial values (App. 32).

On October 27, 2009, the New York Court of Appeals dismissed petitioner's appeal to that court on the ground that no substantial constitutional question was directly involved (App. 26).

REASONS FOR DENYING THE PETITION

The petition for certiorari does not present any issue warranting review by this Court. *See* Sup. Ct. R. 10. This Court has already held that an Indian trader is not immune from state transactional recordkeeping requirements reasonably necessary to the assessment and collection of lawful state taxes. In addition, petitioner's failure to produce book and records substantiating his returns forecloses his claim that New York has taxed extraterritorial values. Accordingly, this Court should deny the petition for certiorari.

I. This Court Has Already Established That Indian Traders Are Not Immune From State Recordkeeping Requirements Reasonably Necessary For The Assessment And Collection Of Lawful State Taxes.

Petitioner's claim that he does not have to maintain and produce basic business records documenting his cigarette sales transactions in New York State and demonstrating the correctness of his New York tax returns does not present an important question of federal law warranting this Court's review. In *Department of Taxation & Finance of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994), this Court settled that Indian traders are properly subject to state regulation "reasonably necessary to the assessment or collection of lawful state taxes," and that such regulation includes "transactional recordkeeping requirements." *Id.* at 75-76.

New York generally requires any person required to file a New York tax return to maintain and produce

books and records sufficient to establish the amount of income and other matters shown on a return. N.Y. Tax Law §§ 658(a), 697(b)(1) (McKinney Supp. 2010); N.Y. Comp. Codes R. & Regs. tit. 20, § 158.1(a) (2005). Petitioner's filing of New York nonresident returns was an acknowledgement that he had New York income, and thus petitioner was required to maintain and produce books and records demonstrating the correctness of his returns and the amount of income properly allocable to New York. New York can lawfully impose income tax on petitioner's sales transactions with non-Indians and on his sales not occurring on the reservations covered by his Indian trader licenses. As the lower court held, New York's recordkeeping requirements are thus reasonably necessary to substantiate where and to whom petitioner's sales were made in New York for the purpose of assessing and collecting the State's lawfully imposed taxes and preventing their circumvention.[1] Accordingly, petitioner's argument that he is exempt from these recordkeeping requirements by virtue of his Indian trader status is foreclosed by this Court's decision in *Milhelm Attea* and presents no issue worthy of this Court's consideration.

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1. A federal regulation promulgated under the Indian trader statutes, 25 U.S.C. § 261 *et seq.*, also required petitioner to keep business records of his trades with Indians that, if produced, might have permitted a sufficient audit of his New York returns. *See* 25 C.F.R. § 140.22 (requiring Indian traders to maintain and submit on request to federal officials "the original invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire").

Nor, as petitioner suggests, does this case present an appropriate vehicle for determining whether New York's personal income tax would be preempted as applied to income earned by an Indian trader trading under a federal license. *See Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) (holding state's gross receipts tax was preempted insofar as applied to sales made to qualified Indians on a reservation by an Indian trader). The New York State Tax Appeals Tribunal accepted for purposes of its decision that New York's income tax would be preempted to the extent that petitioner's sales were to tribal members on a reservation (App. 57). However, because petitioner failed to produce business records such as sales invoices, it was impossible to substantiate that petitioner's sales actually took place on reservations with qualified tribal members as required by his Indian trader licenses. Thus, petitioner failed to establish the factual predicate for any claim that New York is preempted from imposing a personal income tax on the income derived from any such transactions. Accordingly, this issue, which was not reached by the Appellate Division, is not presented here and provides no basis for a grant of certiorari.

II. Petitioner's Failure To Produce Adequate Business Records Precludes Any Argument That New York Has Taxed Extraterritorial Values.

Petitioner's alternative contention that New York State has taxed extraterritorial values does not present an unsettled question for this Court and is itself at odds with this Court's precedent. As petitioner acknowledges, this Court has "clearly expressed the law"

(Ptn. 21) in this area. A taxpayer making such a claim has "the burden to demonstrate by clear and cogent evidence, that the income attributed to the State is in fact out of all appropriate proportions to the business transacted . . . in that State, or has led to a grossly distorted result." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 195 (1995) (internal quotation marks omitted). By failing to produce business records substantiating where and with whom his cigarette sales were consummated in New York, petitioner failed to establish that he "did not avail himself to New York economic markets at all as an Indian Trader" (Ptn. 23).[2] Moreover, petitioner produced no business records from which New York could determine that his income should be apportioned to any other taxing jurisdiction. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 132.15 (1998) (generally apportioning a nonresident taxpayer's business income to New York by way of a three-factor formula based upon the business' real and tangible personal property, business receipts and payroll in New York). By failing to produce adequate books and records supporting the allocation of the income on his returns, petitioner failed to demonstrate at all, let alone by clear and cogent evidence, that New York has taxed extraterritorial values. Accordingly, this claim likewise does not present any issue warranting this Court's review.

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2. The auditor's investigation revealed that petitioner had an employee and agent in New York, rented warehouse space in New York and stored inventory in New York (App. 29).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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